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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/870,023	05/30/2001	Charles L. Branch	4002-2533	9301
52196 7590 01/22/2007 KRIEG DEVAULT LLP ONE INDIANA SQUARE, SUITE 2800 INDIANAPOLIS, IN 46204-2709			EXAMINER PHILOGENE, PEDRO	
			ART UNIT 3733	PAPER NUMBER

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	01/22/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

## Office Action Summary

**Application No.**

09/870,023

**Applicant(s)**

BRANCH ET AL.

**Examiner**

Pedro Philogene

**Art Unit**

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 30 October 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 63-106 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 63-77,80,82,84-92,94-102,105 and 106 is/are rejected.
- 7) ☒ Claim(s) 78,79,83,93,103,104 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 63-77,80,82,84-92, 94-102,105,106 are rejected under 35 U.S.C. 102(e) as being anticipated by Sander et al. (7,048,762).

With respect to claim 63, Sander et al disclose a spinal fusion implant (800) comprising an elongate bone portion defining a longitudinal axis, and having a generally rectangular cross-section transverse to the longitudinal axis; as best seen in FIG.8, the bone portion comprising a first bone engaging surface (812), a second bone engaging surface (813); and a first side wall extending between the first and second bone engaging surfaces, wherein the first side wall comprises a concave surface; as best seen figure 8E and as set forth in column 13, lines 7-67, column 14, lines 1-29.

With respect to claims 64-77,80,89-92,94, Sander et al disclose all the limitations, the shape of the sidewalls, ridges or teeth on the engaging surface, an end wall having a recess or a threaded bore, adapted to engage an implant holder, as best seen in FIGS.8A-G and as set forth in column 13, lines 7-67, column 14, lines 1-29.

With respect to claim 82, Sander et al disclose a spinal fusion implant comprising an elongate bone portion defining a longitudinal axis, as best seen in FIG.8, and

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comprising, a first side wall comprising a concave surface, a second side wall comprising a convex surface generally parallel to the concave surface; as best seen in Fig.8E, a first bone engaging surface positioned between the first and second side walls, and a second bone engaging surface opposite the first bone engaging surface; as best seen in Fig. 8E, wherein at least one of the first or second bone engaging surfaces comprises ridges or teeth; as best seen figure 8E and as set forth in column 13, lines 7-67, column 14, lines 1-29.

With respect to claim 84, Sander et al disclose a system for spinal fusion of adjacent vertebrae, the system comprising a pair of spinal implants; as best seen in FIG.8, the spinal implants comprising an elongate bone portion defining a longitudinal axis and having a generally rectangular cross section transverse to the longitudinal axis; a first bone engaging surface, a second opposite bone engaging surface, and a first side wall extending between the first and second bone engaging surfaces, the first side wall comprising a concave portion (FIG.8) the pair of implants are positioned in an intervertebral space whereby the concave portions define a chamber; as best seen in FIG.8 A-G and as set forth in column 13, lines 7-67, column 14, lines 1-29.

With respect to claims 85-92, 94, Sander et al disclose all the limitations; as best seen in FIG. 8A-G, and as set forth in column 13, lines 7-67, column 14, lines 1-29.

With respect to claim 95, Sander et al disclose an implant for implantation in a disc space between adjacent vertebrae, the implant formed of bone and comprising: a first end having a tool engagement recess and an opposite second end a first bone engaging surface and an opposite second bone engaging surface (FIG.8A-G) a first

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side wall disposed between the first end and the second end and extending from the first bone engaging surface to the second bone engaging surface; a second side wall opposite the first side wall, wherein the implant has a generally rectangular cross section; as set forth in column 13, lines 7-67, column 14, lines 1-29, and as best seen in FIG. 8A-G.

With respect to claims 96-102, 105, 106, Sander et al disclose all the limitations; as best seen in FIG. 8A-G, and as set forth in column 13, lines 7-67, column 14, lines 1-29.

***Allowable Subject Matter***

Claims 78, 79, 81, 83, 93, 103, 104 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Response to Amendment***

Applicant's arguments, see Remarks and Affidavits, filed 10/30/06, with respect to claims 63-106 have been fully considered and are persuasive. The rejection of claims 63-106 has been withdrawn.

Applicant's arguments, see Remarks and Affidavits, filed 10/30/06, with respect to the rejection(s) of claim(s) 63-106 under 102 have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of Sander et al.

***Conclusion***

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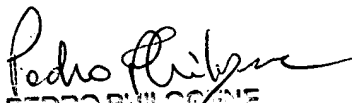
A shortened statutory period for reply to this action is set to expire THREE MONTHS from the mailing date of this action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (571) 272-4716. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571) 272 - 4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Pedro Philogene  
January 10, 2006

  
PEDRO PHILOGENE  
EXAMINER